Filed 6/29/18 Twentieth Century Fox Film Corp. v. Netflix, Inc. CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

TWENTIETH CENTURY FOX FILM CORPORATION et al., Plaintiffs and Appellants, v. NETFLIX, INC., Defendant and Respondent.	B280607 (Los Angeles County Super. Ct. No. SC126423)

APPEAL from an order of the Superior Court of Los Angeles County, Gerald Rosenburg, Judge. Affirmed.

O'Melveny & Myers, Daniel M. Petrocelli, Molly M. Lens, J. Hardy Ehlers, and Jonathan Hacker, for Plaintiffs and Appellants.

Orrick, Herrington & Sutcliffe, Eric A. Shumsky, Karen G. Johnson-McKewan, and Lynne C. Hermle, for Defendant and Respondent.

We have before us an appeal from the denial of an anti-SLAPP motion. Appellants Twentieth Century Fox Film Corporation and Fox 21, Inc. (collectively Fox) sued respondent Netflix, Inc. (Netflix) alleging Netflix improperly induced two Fox executives, Marcos Waltenberg (Waltenberg) and Tara Flynn (Flynn), to breach their employment contracts with Fox; Fox further alleged Netflix's interference with the contracts constitutes unfair competition. Netflix responded by filing a cross-complaint against Fox, alleging the employment agreements are unlawful and Fox engages in unfair competition by using and enforcing them. Fox then filed an anti-SLAPP motion arguing the "enforcement" activity from which it believes the cross-complaint arises consists of protected prelitigation communication and petitioning activity. The trial court disagreed and denied the motion. We consider whether the claims in Netflix's cross-complaint "arise from" protected activity.

I. BACKGROUND

Netflix provides on-demand streaming video content to subscribers over the internet. Twentieth Century Fox Film Corporation (Fox Films) and Fox 21, Inc. (Fox 21) are studios that produce and distribute movies and television shows. Although Netflix licenses content from Fox and other production studios, in recent years Netflix has also begun producing its own content and has become a competitor in the production space. To continue expanding its production of original content, Netflix recruits top business talent in the film and television industry, including employees who currently work for competitors like Fox.

Fox enters into written employment agreements for specified terms of years with certain of its executives. The

contracts provide Fox with an irrevocable option, exercisable in its sole discretion, to extend the employment for an additional fixed term.

The contracts also contain a provision that purports to specify the nature of the services being provided by the employee and to give Fox the right to seek injunctive relief to prevent an employee from breaching the agreement. The provision states: "The services to be furnished by you hereunder and the rights and privileges granted to the Company by you are of a special, unique, unusual, extraordinary, and intellectual character which gives them a peculiar value, the loss of which cannot be reasonably or adequately compensated in damages in any action at law, and a breach by you of any of the provisions contained herein will cause the Company irreparable injury and damage. You expressly agree that the Company shall be entitled to seek injunctive and other equitable relief to prevent a breach of this Agreement by you."

Both Waltenberg and Flynn were employed by Fox under fixed-term employment agreements that provided Fox with the unilateral option to extend the term of the agreements and included the aforementioned injunctive relief provision. Waltenberg and Flynn each departed their employment at Fox to work for Netflix before the end of the fixed-term in their respective agreements. Fox refused to allow either Waltenberg or Flynn to terminate their contracts early. At the time of their respective departures, Waltenberg was Vice President, Promotions for Fox Films and Flynn was Vice President, Creative for Fox 21. After Flynn's departure, Fox sent Netflix a cease and desist letter demanding Netflix refrain from employing Flynn

and enter into an agreement that would stop Netflix from "poaching" and "soliciting" other Fox employees.

A. Fox's Complaint

In September 2016, Fox sued Netflix, complaining that Netflix was engaging in a campaign to "unlawfully target, recruit, and poach valuable Fox executives by illegally inducing them to break their employment contracts with Fox to work at Netflix." According to the complaint, Netflix intentionally interfered with Fox's fixed-term employment agreements with Waltenberg and Flynn by inducing them to breach their contracts with Fox and leave to work for Netflix. Fox's complaint asserted two causes of action for inducing a breach of contract (one pertaining to Waltenberg, the other to Flynn) and a cause of action for unfair competition under California's Unfair Competition Law (UCL) (Bus. & Prof. Code, § 17200 et seq.). Fox sought various forms of relief, including compensatory damages and a permanent injunction enjoining Netflix "from interfering with any of Fox's Fixed-Term Employment Agreements."

B. Netflix's Cross-Complaint

Netflix responded by filing a cross-complaint alleging Fox had engaged in unlawful and anti-competitive business practices that impair employee mobility and prevent competitors like Netflix from fairly competing for skilled employees. The cross-complaint asserts one cause of action for violation of the UCL and another for declaratory relief.

Two key paragraphs in the cross-complaint, which reference Fox's use of the fixed-term agreements, are the core of Netflix's theory of liability. Paragraph 15 alleges Fox "engaged in

the widespread use of unlawfully restrictive fixed-term employment agreements, and requires otherwise typically at-will employees to enter into such agreements as a condition of employment or promotion." Paragraph 15 explains the agreements (1) require those employees to work exclusively for Fox for a specified term of years, (2) provide Fox with the exclusive and unilateral right to extend the length of employment for an additional number of years, and (3) include provisions which unlawfully purport to allow Fox to seek injunctive or other equitable relief to prevent a breach of the agreements. Paragraph 16 of the cross-complaint alleges Fox "enforces its fixed-term employment agreements selectively." It elaborates that Fox permits some employees to terminate their agreements early, withholds its consent from others, and determines if it will enforce the agreements based in part on whether the employee is planning to work for a competitor.

Netflix's cross-complaint also includes allegations regarding Flynn and Waltenberg's relationships with Fox and Fox's response to their departures, describing their situations as "examples" illustrating Fox's unlawful behavior. The cross-complaint alleges the contract term that describes the executives' work as being of "a special, unique, unusual, extraordinary, and intellectual character" and purports to allow Fox to seek injunctive relief to prevent employees from breaching their contracts, is anti-competitive, intentionally misrepresents the nature of the work, and creates a form of involuntary servitude.

In its prayer for relief, the cross-complaint seeks a declaration that Fox's "use of, and attempts to enforce fixed-term employment agreements" constitute unfair competition. Netflix further asks that the court enjoin Fox "from continuing to use or

enforce" the agreements and issue a declaration (1) that the fixed-term agreements are unenforceable and cannot be used to prevent Fox employees from seeking employment with other companies, and (2) that Fox is "estopped from enforcing" the fixed-term agreements to prohibit Fox's employees from working for other companies.

C. Fox's Anti-SLAPP Motion

Fox filed a Code of Civil Procedure[1] section 425.16 special motion to strike Netflix's cross-complaint.[2] As we will describe in greater detail, section 425.16 targets strategic lawsuits against public participation (SLAPPs) by permitting trial courts to strike, at an early stage of the litigation, meritless claims that arise from an opposing party's protected speech or petitioning activity. Fox contended both of Netflix's cross-claims against Fox were based on protected prelitigation communications and litigation activity. In addition, Fox argued Netflix could not show a probability of prevailing on the merits because the Labor Code expressly recognizes the validity of Fox's fixed-term employment agreements, the litigation privilege bars Netflix's cross-complaint, Netflix lacked standing to assert the claims, and Netflix's declaratory relief claim is superfluous. In support of its motion, Fox submitted letters and email correspondence between it and one or more of Netflix, Flynn, and Waltenberg.

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[1] Undesignated statutory references that follow are to the Code of Civil Procedure.

[2] Fox simultaneously filed a demurrer to Netflix's cross-complaint, which was heard on the same day as its anti-SLAPP motion. Only Fox's anti-SLAPP motion is at issue in this appeal.

Netflix opposed the motion, arguing the gravamen of the cross-complaint is Fox's widespread use of illegal fixed-term employment agreements, not litigation or prelitigation activity. Netflix maintained that any allegations in the complaint that might implicate protected activity were merely incidental and, further, that even if Fox demonstrated Netflix's cross-complaint was directed at protected activity, Netflix could demonstrate a probability of prevailing on the merits. Part of the evidence Netflix submitted in support of its opposition were declarations from Flynn and Waltenberg describing their experiences with Fox's fixed-term employment agreements.

After hearing argument from counsel, the trial court denied Fox's anti-SLAPP motion. The court found "[t]he basis for the cross-complaint is not protected conduct." Instead, the court believed the basis of the cross-complaint was "the alleged use of agreements that unlawfully restrict the mobility of employees," "not the means of enforcement [of such agreements] whether by cease and desist letter or litigation." In the trial court's view, Fox's complaint sought to enforce clauses in its employment contracts against Netflix and the thrust of Netflix's cross-complaint was an effort to void the contracts. On that understanding, the court concluded the method of enforceability of the allegedly void contracts is incidental to Netflix's claim and could not provide a proper basis for finding the cross-complaint arose from activity protected by the anti-SLAPP statute.

II. DISCUSSION

In our independent judgment, Netflix's cross-claims do not arise from Fox's prelitigation communications or litigation activity. Rather, Netflix's claims are predicated on Fox's business

practices related to the fixed-term agreements. As alleged in the cross-complaint, those business practices consist of: (1) requiring certain employees to sign employment agreements that bind the employee to work at Fox for a specified number of years, allow Fox to unilaterally extend the term of the agreement, and purport to give Fox the right to obtain an injunction against the employee to prevent him or her from leaving Fox's employ; and (2) selectively consenting to the termination of some, but not all, such agreements, depending in part on whether the employee seeking to depart intends to work for a competitor. Though the cross-complaint does contain allegations regarding prelitigation communications by Fox, those communications do not serve as a basis for Fox's asserted liability and they are incidental to Netflix's claims. Because we conclude Netflix's claims do not arise from protected activity, we affirm the denial of the anti-SLAPP motion.

A. The Anti-SLAPP Statute

Section 425.16 was enacted in response to "a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." (§ 425.16, subd. (a).) The statute authorizes a defendant (or cross-defendant) to file a special motion to strike "in order to expedite the early dismissal of unmeritorious claims" arising from protected activity. (*City of Montebello v. Vasquez* (2016) 1 Cal.5th 409, 416, 420.) The anti-SLAPP statute identifies four categories of protected activity, including the two categories at issue here: "(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by

law;" and "(2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law." (§ 425.16, subds. (e)(1)-(2).) "To encourage 'continued participation in matters of public significance' and to ensure 'that this participation should not be chilled through abuse of the judicial process,' the Legislature expressly provided that the anti-SLAPP statute 'shall be construed broadly.' (§ 425.16, subd. (a).)" (*Simpson Strong-Tie Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 21.)

Our analysis under the anti-SLAPP statute proceeds in two stages. "First, the [moving party] must establish that the challenged claim arises from activity protected by section 425.16. [Citation.] If the [moving party] makes the required showing, the burden shifts to the [non-moving party] to demonstrate the merit of the claim by establishing a probability of success." (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 384 (*Baral*).) "Only a cause of action that satisfies both prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning and lacks even minimal merit—is a SLAPP, subject to being stricken under the statute." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89, italics omitted (*Navellier*).)

We review an order granting or denying an anti-SLAPP motion *de novo*. (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1067 (*Park*).) We consider the parties' pleadings and affidavits describing the facts on which liability or defenses are predicated. (§ 425.16, subd. (b)(2); see also *San Diegans for Open Government v. San Diego State University Research Foundation* (2017) 13 Cal.App.5th 76, 94.)

B. Netflix's Cross-Complaint Does Not Arise From Protected Activity

Under the first prong of the anti-SLAPP analysis, "the moving defendant bears the burden of establishing that the challenged allegations or claims 'aris[e] from' protected activity in which the defendant has engaged." (*Park*, *supra*, 2 Cal.5th at p. 1061.) Whether the defendant carries that burden "turns on two subsidiary questions: (1) What conduct does the challenged cause of action 'arise[ ] from'; and (2) is that conduct 'protected activity' under the anti-SLAPP statute?" (*Mission Beverage Co. v. Pabst Brewing Co., LLC* (2017) 15 Cal.App.5th 686, 698 (*Mission Beverage*).)

"A claim arises from protected activity when that activity underlies or forms the basis for the claim." (*Park*, *supra*, 2 Cal.5th at p. 1062.) Whether a claim is based on protected activity turns on "whether the "'core injury-producing conduct"' warranting relief under the cause of action is protected." (*Mission Beverage*, *supra*, 15 Cal.App.5th at p. 698.) We assess whether this is so "by identifying '[t]he allegedly wrongful and injury-causing conduct . . . that provides the foundation for the claim.' [Citation.]" (*Colyear v. Rolling Hills Community Assn. of Rancho Palos Verdes* (2017) 9 Cal.App.5th 119, 134.) "[T]he mere fact an action was filed after protected activity took place does not mean it arose from that activity." (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 76-77 (*Cotati*).) Rather, "the defendant's act underlying the plaintiff's cause of action must *itself* have been an act in furtherance of the right of petition or free speech." (*Id.* at p. 78.) That is because "[t]he anti-SLAPP statute's definitional focus is not the form of the plaintiff's cause of action but, rather, the defendant's *activity* that gives rise to his or her asserted

liability—and whether that activity constitutes protected speech or petitioning." (*Navellier*, *supra*, 29 Cal.4th at p. 92.) "Assertions that are 'merely incidental' or 'collateral' are not subject to" the anti-SLAPP statute, and "[a]llegations of protected activity that merely provide context, without supporting a claim for recovery, cannot be stricken under the anti-SLAPP statute." (*Baral, supra*, 1 Cal.5th at p. 394.)

Our Supreme Court most recently addressed the "arising from" requirement in *Park*. There, the Court emphasized the distinction between "activities that form the basis for a claim and those that merely lead to the liability-creating activity or provide evidentiary support for the claim." (*Park*, *supra*, 2 Cal.5th at p. 1064.) "[A] claim may be struck only if the speech or petitioning activity *itself* is the wrong complained of . . . ." (*Id.* at p. 1060.) Even if it may be said that a claim was filed "because of protected activity," the claim nevertheless does not arise out of the protected activity if it does not "supply . . . elements [of the challenged claim] and consequently form the basis for liability." (*Id.* at p. 1063-1064.) *Park* itself provides an example. There, the plaintiff brought a discrimination claim against the university that had denied him tenure. The Court considered whether the claim arose from protected activity and held it did not, concluding Park's claims depended only on "the denial of tenure itself" and "not on the grievance proceeding, any statements, or any specific evaluations of him in the tenure process . . . ." (*Id.* at p. 1068.)

Two other cases decided by our Supreme Court and discussed in *Park* also help illustrate when protected activity does and does not form the basis of liability. In *Cotati*, property owners challenged the constitutionality of a city ordinance in federal court, seeking declaratory and injunctive relief. (*Cotati*,

supra, 29 Cal.4th at p. 72.) The city filed its own declaratory judgment action in state court advocating for the validity of the ordinance, and the property owners filed an anti-SLAPP motion. (*Ibid.*) Our Supreme Court held that even though the property owners' lawsuit may have triggered the city's action, the latter did not arise from the former because the basis of the city's declaratory judgment claim—the existence of an actual controversy over the legality of the ordinance—existed independent of the property owners' lawsuit. (*Id.* at p. 80.) In contrast, in *Navellier*, our Supreme Court found the plaintiffs' claims arose from protected activity where the plaintiffs sued the defendant for fraud on the ground that he had entered into a release in connection with the settlement of a prior action without intending to be bound by it. (*Navellier*, *supra*, at pp. 86-87.) The fraud suit arose from the defendant's protected activity, specifically, his negotiation and execution of the release and his counterclaim filings in the prior suit because "but for the [prior] lawsuit and [the defendant's] alleged actions taken in connection with that litigation, plaintiffs' present claims would have no basis." (*Id.* at p. 90.)

In this case, Netflix's cross-complaint asserts claims for violation of the unfair and unlawful prongs of the UCL and for declaratory relief. "A UCL action '"to redress an unlawful business practice 'borrows' violations of other laws and treats these violations, when committed pursuant to business activity, as unlawful practices independently actionable under [the UCL]. . . ."' [Citation.]" (*Paulus v. Bob Lynch Ford, Inc.* (2006) 139 Cal.App.4th 659, 677.) A UCL action based on the statute's unfairness prong must allege a competitor "has committed an 'unfair' act or practice," meaning conduct which '"threatens an

incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition.' [Citation.]" (*Id.* at p. 679.) A declaratory relief action requires the pleading of "'an actual, present controversy . . . ' and 'the facts of the respective claims concerning the [underlying] subject . . . .' [Citations.]" (*Cotati*, *supra*, 29 Cal.4th at p. 80.)

Perusing the cross-complaint, we conclude its claims do not arise from protected activity. The allegedly unlawful and unfair business practices at issue are Fox's practice of requiring employees to sign the challenged fixed-term employment agreements and Fox's alleged practice of selectively granting or denying employees' requests to terminate those agreements early based at least partially on whether the employee intends to work for a competitor. The cross-complaint alleges these practices are unlawful because they create an improper restraint on trade in violation of Business and Professions Code section 16600 and unfair because they prevent free mobility in the workplace and chill and deter competitors from soliciting, recruiting, and hiring Fox employees. The actual controversy between the parties relates to the validity and enforceability of Fox's agreements and Netflix's rights (or lack thereof) to compete for Fox's employees. As alleged, the dispute giving rise to asserted liability does not arise from actions "in furtherance of" Fox's free speech or petition rights. (§ 425.16, subd. (e).)

Fox of course contends otherwise, arguing the numerous references to "enforcement" in Netflix's cross-complaint necessarily refer to protected litigation activity and/or prelitigation communications. The core of Fox's argument is that

the word "enforce" must be synonymous with "litigate" or "prelitigation communication" because the word "enforce" is modifying "contract" or "agreement." The argument, however, focuses too narrowly on select words and phrases in the cross-complaint. Though it does not define "enforce," a reasonable reading of the cross-complaint nevertheless demonstrates "enforce" encompasses Fox's business practice of permitting some employees to terminate their fixed-term agreements early, while withholding consent from others, based in part on whether they seek to leave in order to work for a competitor. Neither prelitigation communications nor litigation activity are included in the cross-complaint's description of "enforcement" or in its other references to Fox's enforcement of the contracts—including Netflix's allegation that it "has suffered an injury in fact and has lost money or property as a result of Fox's attempts to enforce unlawful fixed-term employment agreements . . . ."[3]

To the extent Fox argues the plain meaning of the word "enforce" supports its view of the cross-complaint, we reject the argument because "enforce" has multiple meanings, none of which are merely a synonym for "litigate." (Webster's 3d New

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[3] Fox argues this reading does not undermine its contention that Netflix's claims arise from protected activity because Fox withholds its consent to early contract termination through prelitigation communications and litigation. Fox's argument ignores the distinction between the basis for the claims (Fox's decisions and business practices) and Fox's subsequent communications regarding its decisions. (See, e.g., *Park*, *supra*, 2 Cal.5th at p. 1067 [underscoring the importance of "distinguish[ing] between the challenged decisions and the speech that leads to them or thereafter expresses them"].)

Internat. Dict. (2002) p. 751 ["enforce" means, among other things, "5: CONSTRAIN, COMPEL <~obedience from children> . . . 7: to put in force: cause to take effect: give effect to esp. with vigor <~ laws> <a government unable to ~ its national interests> <*enforced* his rule by cruel methods –C.S.Forester>"].) Agreeing with Fox's position would effectively require us to substitute some variation of the word "litigate" or "prelitigation communication" in every instance the cross-complaint uses "enforce" or "enforcement." That, in our view, would contravene our obligation to review the cross-complaint as drafted. (*Central Valley Hospitalists v. Dignity Health* (2018) 19 Cal.App.5th 203, 218 ["It is not our role to engage in what would amount to a redrafting of the [cross-complaint] in order to read that document as alleging conduct that supports a claim that has not in fact been specifically alleged, and then assess whether the pleading that we have essentially drafted could survive the anti-SLAPP motion directed at it"], citation and internal quotations marks omitted.)

Fox also identifies certain specific allegations in the cross-complaint that reference litigation or prelitigation communications and argues the inclusion of these allegations means Netflix's claims arise from protected activity. For instance, Fox contends allegations regarding "legal threats and injunctions" or the "threat of litigation to obtain an injunction" refer to protected prelitigation communication. Read in context, however, the allegations refer to Fox's decision to make use of the contract clause which purports to grant Fox the ability to seek injunctive or other equitable relief to prevent employees from breaching their agreements. Though some of the references are more ambiguously worded than others, all are best read to state

the "legal threats" contemplated are made to Fox's own employees and are included as evidence of the asserted unlawfulness of the agreements, not to establish Fox's liability based on activity protected by section 425.16. In a related vein, Fox contends the allegations that Fox "threatened retaliation" following the departures of Flynn and Waltenberg, sent Netflix a cease and desist letter, and is "not shy about discouraging competing employers from recruiting or hiring its employees" constitute protected activities from which Netflix's claims arise.

The parties agree statements made in anticipation of litigation may fall into the category of protected activity. (See *Digerati Holdings, LLC v. Young Money Entertainment, LLC* (2011) 194 Cal.App.4th 873, 887 [prelitigation statements protected by SLAPP if they """concern[ ] the subject of the dispute" and [are] made "in anticipation of litigation 'contemplated in good faith and under serious consideration"""].) There can be no real dispute that the cease and desist letter Netflix attached to its cross-complaint constituted such a statement. And to the extent the cross-complaint's allegations can be said to reference any other prelitigation communications between Fox and any of Flynn, Waltenberg, or Netflix, those communications are also protected activity. We doubt, however, that the more general allegation asserting Fox is "not shy about discouraging" competitors can be read as referring to protected activity since it does not identify the actions Fox took to discourage competitors. (See *Central Valley Hospitalists v. Dignity Health*, *supra*, 19 Cal.App.5th at p. 218 ["'If there are no acts alleged, there can be no showing that alleged acts arise from protected activity"'].) Nevertheless, we assume all of these are protected for the purposes of analyzing whether they are merely

incidental to Netflix's claims.

"A claim based on protected activity is incidental or collateral if it 'merely provide[s] context, without supporting a claim for recovery.' (*Baral*, *supra*, [1 Cal.5th]at p. 394.)" (*Okorie v. Los Angeles Unified School Dist.* (2017) 14 Cal.App.5th 574, 587.) Similarly, a claim may not be struck if the speech or petitioning activity is "just evidence of liability or a step leading to some different act for which liability is asserted." (*Park*, *supra*, 2 Cal.5th at p. 1060.) Here, the acts that supply the elements of Netflix's claims are Fox's alleged business practices of utilizing fixed-term agreements with allegedly unlawful and restrictive clauses and selectively determining which employees will be allowed to terminate those contracts early. Netflix does not allege the cease and desist letter (or eventual filing of Fox's complaint) supports any of its claims for liability. (*Baral*, *supra*, at p. 394; see also *Aguilar v. Goldstein* (2012) 207 Cal.App.4th 1152, 1161 [allegations regarding filing of lawsuit were incidental to the plaintiff's claims where the complaint did not allege the filing "g[ave] rise to any additional liability"].) Indeed, Netflix could have omitted the challenged allegations and still have stated the same claims. (See *Park*, *supra*, 2 Cal.5th at p. 1068; *Cotati*, *supra*, 29 Cal.4th at p. 80.) The allegations regarding Fox's prelitigation communications are incidental to Netflix's claims.

Finally, Fox argues Netflix's cross-complaint "arises from" Fox's protected activity because Netflix seeks "injunctive relief that expressly would restrict [Fox's] exercise of petition rights." As support for this argument, Fox cites our Supreme Court's decision in *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67 (*Equilon*).

We find the argument is unpersuasive for several reasons. For one thing, "[i]n the anti-SLAPP context, the critical point is whether the plaintiff's cause of action itself was *based on* an act in furtherance of the defendant's right of petition or free speech." (*Cotati*, *supra*, 29 Cal.4th at p. 78.) In other words, """"[t]he anti-SLAPP statute's definitional focus is . . . the defendant's *activity* that gives rise to his or her asserted liability—and whether that activity constitutes protected speech or petitioning""" not the remedy sought. (See *Guessous v. Chrome Hearts, LLC* (2009) 179 Cal.App.4th 1177, 1186-1187 [noting "'[i]njunctive relief is a remedy, not a cause of action"'].) For another, the cross-complaint's prayer for injunctive relief seeks to enjoin Fox "from continuing to use or enforce fixed-term employment agreements or other restraints of trade against its employees in California." As we have already determined, the cross-complaint's use of the word "enforce" does not logically equate to petitioning activity or prelitigation communications, and to the extent such protected activity is referenced in the cross-complaint, it is incidental to Netflix's claims.

The citation to *Equlion* does not rescue Fox's argument; the holding in that case does not mean we must treat Netflix's request for injunctive relief as indicative of the presence of claims arising from protected activity. In *Equilon*, the defendant served a notice of intent to sue under Proposition 65. The plaintiff responded by filing a suit seeking both a declaration that the notice did not comply with California regulations and an injunction barring the defendant from filing a Proposition 65 enforcement action. (*Equilon*, *supra*, 29 Cal.4th at p. 57.) *Equilon* held the plaintiff's "action for declaratory and injunctive relief [was] one arising from [the defendant's] activity in

furtherance of its constitutional rights of speech or petition—viz., the filing of Proposition 65 intent-to-sue notices." (*Id.* at p. 67.) In a footnote, the Court observed it did not need to determine "whether or when a pure declaratory relief action seeking mere clarification of past speech or petitioning . . . might evade anti-SLAPP scrutiny" to decide the appeal. (*Id.* at p. 67, fn. 4.) Neither *Equilon's* holding nor its footnote four suggests a declaratory-relief cause of action that does not arise from protected activity is transformed into one that does just because the plaintiff also lists in its prayer for relief an injunctive remedy that might, if inappropriately tailored or justified, have the effect of infringing protected activity.

Because we conclude Fox failed to meet its initial burden of demonstrating Netflix's claims are subject to the anti-SLAPP statute, we need not consider whether Netflix demonstrated it is likely to succeed on the merits. The anti-SLAPP motion was properly denied.

DISPOSITION

The judgment is affirmed. Respondent shall recover its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BAKER, J.

We concur:

KRIEGLER, Acting P.J.

KIM, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.